No. 337.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS NO. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, *Petitioners*,

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A CORPORATION, EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

The Companies' brief in opposition to granting certiorari raises new issues which warrant a reply.

QUESTIONS PRESENTED.

The Companies state that "the respective authority of the Board and the court below" is not "involved" and that "the court merely held there was no factual basis for any one of these three alleged questions presented" (E. P. Br. 2). It is the authority of the court to make precisely such an independent original judicial determination of facts that petitioners question.

STATEMENT.

The Companies claim that the facts disclosed by the new evidence were known to the Board and to the court at all times. Their discussion of the Board's and of the court's original decisions contains inaccuracies and contradictions.

They state repeatedly that "immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants" (E. P. Br. pp. 5, 6, 7, 13). However, they omit to state that the claimants would have had to share these 364 jobs with all other old employees returning to work after July 5, 1935 (called "reapplicants" by the Board, R. 298; Bd. Mem. 7). Since these 364 jobs were not exclusively available for the 209 claimants, and since there were over 500 old employees who had not returned to work by July 5, 1935 (R. 132), it appeared there were not enough jobs available for all claimants and reapplicants. This result, that there were not enough jobs available for all, is in accord with the Companies' original claims (R. 10-18, 19-21). Based upon these claims and evidence of the Companies, the Board concluded that "at all times there were less jobs open than old employees available" (R. 132), and that "we cannot assume that they [claimants] and only they would have been given these jobs had the respondents acted lawfully" (R. 133-134).

Similarly, on page 5 of their brief the Companies state:

> "Thus there was no doubt in the mind of the then Board, or of the court below that immediately after

> July 5, 1935, there was available employment for the 209 claimants.

As shown above, the Board made no such finding. In support of their statement, the Companies quote from 119 F. (2d) l. c. 913, 914, as follows (E. P. Br. 5):

> On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned, and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. The Board found, justifiably, that petitioners from July 5, 1935, to November 1, 1935, had jobs available.
>
> * * * * * * * * * * *
>
> This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, or thereafter while jobs were available, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages.

An important passage is omitted from the midst of this quotation (119 F. (2d) l. c. 913):

> * * * The Board determined that, in the absence of the unfair labor practice of petitioners in imposing an illegal condition upon reinstatement (membership in the Tri-State Union), they would have put back to work and paid wages to *a portion of the group* affected by the reinstatement and back wage provision of its order. * * * (R. 203)

The expression "a portion of the group," which we italicize, is the essence of the entire quotation. It demonstrates once more that the Board and the court founded their decisions upon the primary assumption that there were "less jobs open than old employees available."[1]

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[1] That this assumption was false was first discovered during compliance proceedings when the Board examined the Companies' pay

Also, on page 13 of their brief all reference to other old employees (reapplicants) is omitted:

> The proceeding below was instituted exclusively upon the theory that the Board was mislead into, or fell into the inadvertent error of, believing that on and after July 5, 1935, the new jobs opening up in the plants of these respondents were insufficient to furnish employment to 209 claimants. The record clearly shows that the evidence established, that these respondents conceded, that the Board found, that the court below held, that either 364 or 366 jobs opened up immediately after July 5, 1935. Hence the Board, the present petitioners, these respondents, and the court below, at all times, knew that available jobs exceeded the number of claimants. Under these circumstances the claim of deception or inadvertent error was a plain and frivolous absurdity which the court below properly denied.

But, the fact cannot be obscured that these 364 jobs were not available for the claimants alone, but would have been shared by claimants and reapplicants, numbering over 500 in all. The Companies are fully aware that this was the assumption of the Board, for on page 5 (bottom line) of their brief, they say:

> * * * all pre-strike employees would have enjoyed equal rights but *all* could not have been rehired; * * *

and on page 25 of their brief, they continue:

> The original Board properly held, however, that, in view of the reduced employment level, there was no certainty that the 209 claimants would have received 209 of these available positions if there had been no discrimination whatsoever. That was the whole basis of the formula of the original board.

ARGUMENT.

1. The printed record complies with Rule 38 (7) and (8). It is complete and adequate. The Board prepared and submitted a printed record for the present controversy in the court below (R. 231-280). This entire printed record below is included in the printed record here, as well as all proceedings in that court and opinions there (R. 187-208, 213-230, 231-280, 281, 282, 283-290, 291-304, 306, 307-312, 313-324, 329-342 343-351). Furthermore, all findings, etc. of the Board reported in 16 N. L. R. B. 727-882, and the decree affirming them, 119 F. (2d) 903, are printed here (R. 25-180, 181-182, 187-208). In addition, the typewritten transcript on review and enforcement is now on file in this Court (R. 351), "with full opportunity to all parties to refer to any portion thereof" (Motion of Petitioners, 2).

The Solictor General on behalf of the Board agreed to the sufficiency of the printed record (Motion of Petitioners, 2), and on this basis made a thorough analysis of all issues. While the Companies claim that the printed record is inadequate, and on page 4, note 1, of their brief state,

> References to the typewritten transcript, unprinted, will be thus designated (Tr. 1).

their brief in opposition does not contain a single citation to that transcript. They refer only to the printed record.

Counsel for the Companies on several occasions during July, 1944, were asked to designate any additional portions of the transcript for printing. They did not do so, although a draft of the petition for certiorari was furnished them nearly three weeks before it was filed. They now make no such designation. However, that opportunity is still open to them. In accordance with the stipulation proposed by petitioners and agreed to by the Solicitor General, petitioners are perfectly willing to print any additional material "the respective parties may designate" (R. 350).

2. The Companies claim that "petitioners are without capacity to maintain the application for certiorari" (E. P. Br. 16). This claim is contrary to Section 240 (a) of the Judicial Code, authorizing, in a circuit court of appeals case, the issuance of a writ of certiorari "upon the application of any party thereto." See, Section 10 (e) of the National Labor Relations Act. Petitioners were at all times parties. They were parties before the Board (R. 27).[2] They were parties in the court below on review and enforcement (R. 187; 119 F. (2d) 903). They were parties below on the Board's petition to remand (R. 306, 307; 141 F. (2d) 843). They were parties when they were granted leave by the court to file their motion (R. 326). They were parties when their motion was considered (R. 343).

Moreover, Section 10 (f) of the Act authorizes "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to institute proceedings. The Act here has reference to employees or their organizations, since only they could be aggrieved by an order denying relief. *Jacobson v. National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3). That petitioners are "aggrieved litigants" is not denied by the Companies (E. P. Br. 24).

Amalgamated Utility Workers, etc. v. *Consolidated Edison Co.*, 309 U. S. 261, and *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, discussed by the Companies, are not in point. In *National Licorice Company*, the claim was made by an employer that employees *must* be brought into the case as parties, and the issue was not whether employees who are parties *may* be aggrieved. The *Amalgamated* case denied a union the right to institute contempt proceedings to "enforce" a final order. In the instant case, however, petitioners seek to set aside, they

[2] Article II, Sec. 5, of the Rules and Regulations of the National Labor Relations Board: "After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties') a formal complaint in the name of the Board * * *."

"contest" an order.[3] The Companies' statement that petitioners are "seeking enforcement by vacation of a decree" (E. P. Br. 18) is a contradiction in terms.

3. All other matters contained in the Companies' brief in opposition are fully answered in the memorandum filed by the Solicitor General.

Respectfully submitted,

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[3] The Court in the *Amalgamated* case, 309 U. S. 261, 268, based its decision on the fact that the procedure provided in the National Labor Relations Act was analogous to that provided by Section 5 of the Federal Trade Commission Act without mentioning that with respect to the persons entitled to petition for review the language of the Acts differs materially. Section 5 (c) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order * * *" (15 U. S. C., Sec. 45 (c)).